

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Desco Strickland,
Petitioner,

vs.

Case No. 1:08cv131
(Barrett, J.; Hogan, M.J.)

Warden, Chillicothe Correctional
Institution,
Respondent.

REPORT AND RECOMMENDATION

This habeas corpus action brought *pro se* pursuant to 28 U.S.C. § 2254 is before the Court on petitioner's motion to voluntarily dismiss and strike the habeas petition without prejudice. (Doc. 17). Petitioner requests that the petition be dismissed because he has not exhausted his currently pending state court appeal remedy. (*See id.*).¹

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides: "The Federal Rules of Civil Procedure, to the extent they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Rule 41(a)(2), Fed. R. Civ. P., provides that the Court may dismiss an action "at the plaintiff's instance" upon "such terms and conditions as the court deems proper."

Pursuant to Fed. R. Civ. P. 41(a)(2), it is **RECOMMENDED** that petitioner's

¹In the "Answer/Motion To Dismiss" filed by respondent on February 19, 2009, respondent confirms that petitioner was granted a delayed appeal, which at this juncture is pending before the Ohio Court of Appeals, First Appellate District. (Doc. 16, pp. 3-4).

motion to voluntarily dismiss and strike the instant habeas corpus petition (Doc. 17) be **GRANTED**, and that the petition filed pursuant to 28 U.S.C. § 2254 (Doc. 3) be **DISMISSED** without prejudice to refiling after petitioner has exhausted his state court remedies.

Date:

4/3/09
cbc



Timothy S. Hogan
United States Magistrate Judge

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NOTICE

Attached hereto is a Report and Recommendation issued by the Honorable Timothy S. Hogan, United States Magistrate Judge, in the above-entitled habeas corpus action. Pursuant to Fed. R. Civ. P. 72(b), which may be applied in this action under Rules 1 and 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, any party may object to the Magistrate Judge's Report and Recommendation within ten (10) days after being served with a copy thereof. Such party shall file with the Clerk of Court and serve on all other parties written objections to the Report and Recommendation, specifically identifying the portion(s) of the proposed findings, recommendations, or report objected to, together with a memorandum of law setting forth the basis for such objection(s). Any response by an opposing party to the written objections shall be filed within ten (10) days after the opposing party has been served with the objections. *See Fed. R. Civ. P. 72(b).* A party's failure to make objections in accordance with the procedure outlined above may result in a forfeiture of his rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

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